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# Supreme Court of the United States

Nos. 1009 and 1010.

328 & 329

OCTOBER TERM, 1924.

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CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY,

*Appellant,*

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, and THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

*Appellees.*

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## BRIEF OF APPELLANT.

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*Of Counsel.*

LESTER A. JAFFE,
*On the Brief.*

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# Supreme Court of the United States

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October Term, 1924.

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CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY,

*Appellant.*

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, and THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

*Appellees.*

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## BRIEF OF APPELLANT.

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### GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The appeals in these two cases are from identical decrees of the United States District Court for the Southern District of Ohio, entered in that court on February 7, 1925, in two cases there, dismissing the petitions as amended of the appellant here, the Cincinnati, Indianapolis & Western Railroad Company, petitioner in the District Court in each

case, on the sole ground of want of jurisdiction of the court to entertain the same (R. 49).

The relevant portion of the decree is (R. 49):

> "And the court, being fully advised in the premises, finds that the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, is not ancillary, but is original, and that as an original bill this court is without jurisdiction to entertain the same, because no federal question is presented therein, and because the requisite diversity of citizenship does not exist.
>
> "It is, therefore, ordered, adjudged and decreed that the joint and several motion of the above named defendants be and the same is hereby granted, and that the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, be and the same hereby is dismissed at the cost of said petitioner for the sole reason and ground hereinabove specified."

The court certified in each case, on February 18, 1925 (R. 52-3), that it sustained the joint and several motion of the defendants in the trial court, the Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company (appellees here) and dismissed the petition as amended:

> ". . . on the sole ground that it appears on the face thereof that said petition, as amended, does not show the existence of the requisite diversity of citizenship nor the existence of a Federal question; and that this court, not having found the said petition to be ancillary to any prior suit, but having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction, as more fully appears from the opinion and supplemental opinion of this court filed herein, which opinion and supplemental opinion are hereby directed to be certified

and transmitted to the Supreme Court of the United States as part of the record herein.

(fol. 85a.) "All of which is hereby certified unto the Supreme Court of the United States conformably to Section 238 of the Act of Congress of March 3, 1911, as amended, known as the Judicial Code." (R. 52.)

The opinions referred to will be found at pages 33 to 42 of the record and pages 45 to 49 of the record. The opinions do not appear in the Federal Reporter.

A stipulation was filed in this court on March 21, 1925, that case No. 1010 should be heard on the record in case No. 1009 in this court and that the printed record in No. 1009, October Term, 1924, should serve as the record in case No. 1010 (R. 120-121). Two cases in the District Court were likewise heard as one.

The appeal in No. 1009 is from the decree of the District Court entered in the cause in that court numbered 50, in equity, on its docket and entitled, *Equitable Trust Company of New York* and *Elias J. Jacoby*, as trustees, complainants, vs. *Cincinnati, Indianapolis & Western Railway Company et al.*, defendants.

The appeal in No. 1010 is from the decree of the District Court entered in the cause in that court numbered 51, in equity, on its docket and entitled, *Central Trust Company of New York* and *Augustus L. Mason*, as trustees, complainants, vs. *Cincinnati, Indianapolis & Western Railway Company et al.*, defendants.

The two cases, Nos. 50 and 51, were mortgage foreclosure suits with necessary diversity of citizenship and amount to establish jurisdiction (R. 14) and the appellant, Cincinnati, Indianapolis & Western Railroad Company, is the assignee of the purchaser at the foreclosure sales (R. 2, 34) and became a party to each cause as such assignee, as permitted in the decree of foreclosure (R. 2, 22 bot.).

The petitions for the dismissal of which for want of jurisdiction of the court, appeals are now taken, sought relief from elections erroneously made by petitioner, which elections were authorized to be made under the foreclosure decrees and the petitions asked for modifications of the foreclosure decrees to permit such relief (R. 2, 11). The last opinion of the trial court was, in substance, that such petitions were not ancillary to the foreclosure cases (R. 45, 49).

The foreclosure decrees provide:

> "The purchaser and his successors or assigns shall have the right, for the period of thirty days after the delivery of the deed or instruments of transfer from the Special Master hereinafter provided for, to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the clerk of this court within said period of thirty days." (R. 23), and
>
> "(11) All questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this court for further relief at the foot of this decree" (R. 26).

The Cincinnati, Indianapolis & Western Railroad Company, which had been incorporated to acquire the railroad and property acquired by the purchaser at said foreclosure sale, believing that, under the foreclosure decree, it had the right to adopt one contract originally made by one of the constituent companies of defendant corporation for use of the tracks of the Union Railway Company in Indianapolis and reject the contract made with the other of said constituent companies for a like use, filed, within

the time prescribed in the decree, its election so to adopt and reject (R. 8). The said Indianapolis Union Railway Company thereupon intervened in said foreclosure suit and asserted its right to hold the railroad company on both contracts, asking that the foreclosure decree be construed in conformity with its contention. The District Court held that by accepting one of said contracts the railroad company became bound by both, and this was affirmed by the Circuit Court of Appeals.

The Railroad Company thereupon filed its petition in the same cause asking to be relieved of the election as so construed by the court by rescinding its election made as aforesaid on the ground of mistake and praying that the foreclosure decree be amended to permit such relief (R. 1, 2, 11). The Indianapolis Union Railway Company and the other railroad companies using the Union Depot in Indianapolis were made parties defendant to the said petition.

The said defendants appeared and filed a joint and several motion to dismiss said petition on the ground

> "that it appears upon the face of said petition, as amended, that the court is without jurisdiction to entertain the same, because the petition, as amended, presents no federal question, and diversity of citizenship requisite to jurisdiction does not appear upon the face of the petition as amended, which, although purporting to be a proceeding in the cause as above entitled, is in fact an independent suit *de novo*" (R. 45).

The court, as before stated, thereupon dismissed the petition as amended for want of jurisdiction (R. 49).

The appeals are taken conformably to *Section 238* of the Act of Congress of March 3, 1911, c. 231 (36 Stat. 1157); Act of January 28, 1915, c. 22, sec. 2 (38 Stat. 804).

Leading cases believed to sustain the jurisdiction are: *Hoffman* v. *McClelland*, 264 U. S. 552; *Central Union Trust*-

*Company of New York* v. *Anderson County, Texas, et al.*, 268 U. S. 93, 45 Sup. Ct. 427; *Smith* v. *Apple*, 264 U. S. 274, 277.

The decree of dismissal of February 7, 1925, was entered before passage of the recent act affecting the jurisdiction of this court, approved February 13, 1925 (Public Act No. 415, 68th Congress). Section 14 of that Act provides:

> "That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

The recent Act, therefore, has no application to the present appeals.

## STATEMENT OF THE CASE.

For convenience, this statement is made as if there were but a single case before the court, because the issues involved in the two cases are the same.

The terminal in the City of Indianapolis was originally established under a contract dated September 20, 1883, whereby five original proprietary companies agreed to an equal division of a fixed rental for the use of the Union Railway facilities by way of interest at 7% upon the appraised value of the Union Railway properties and Belt Line (R. 55). The agreement provided that such fixed rental should be

> "from time to time divided into as many equal shares as there are railroad companies using said property and each company so using the same shall pay one of said shares" (R. 56).

Provision was also made for the admission of other named non-proprietary companies, eight of which subsequently were admitted to the use of the terminal facilities. One of these eight subsequent signatories to the agreement was the Indianapolis, Decatur & Springfield Railway Company (later the Indianapolis, Decatur & Western Railroad), operating a line westwardly from Indianapolis; another was the Cincinnati, Hamilton & Indianapolis Railroad Company, operating a line eastwardly from Indianapolis. The two companies last named, in 1902, were consolidated into the Cincinnati, Indianapolis & Western Railway Company, which from the time of such consolidation until the bringing of the suit to foreclose the mortgages hereinafter referred to, assumed the obligation of, and paid rental under, each of the two contracts of its constituent companies, or, in other words, paid two-thirteenths of the fixed rental (R. 34). In 1906, the said contract of December 14, 1883, was modified by the agreement of all the parties thereto, the agreement of modification being separately signed by the Cincinnati, Indianapolis & Western Railway Company as successor to the contract with the Indianapolis, Decatur & Springfield Railway Company and as successor to the contract with the Cincinnati, Hamilton & Indianapolis Railroad Company (R. 6 bot., 7).

The Cincinnati, Indianapolis & Western Railway Company defaulted in the payment of its mortgage indebtedness, a foreclosure suit was brought in the court below and, in 1915, a decree of foreclosure and sale was entered (R. 14). This decree contained the provision, quoted above, allowing the assignee of the purchaser to elect to assume or not to assume any contract made by the consolidated company or its predecessors in title (R. 3, 23).

Within the thirty-day period, the present appellant (assignee of the purchaser as aforesaid) filed an instrument purporting to reject the contract of one of its predecessors,

and accepting the contract of the other (R. 3). This election was made on the assumption that the two contracts were separate and distinct and that the railroad company had the option to accept or reject either or both of them (R. 8).

In October, 1916 (R. 53), the Indianapolis Union Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and the Vandalia Railroad Company (the last of which companies has since been absorbed by the second of these companies) (R. 8 bot.), filed in the foreclosure case their petition against the Cincinnati, Indianapolis & Western Railroad Company. These petitioners had not theretofore been parties to the foreclosure suit (R. 113 bot.). They alleged, however, that the railroad company

> "is acting without warrant of law and contrary to the provisions and intent of said decree of foreclosure and this petitioner prays the court that the Cincinnati, Indianapolis & Western Railroad Company shall, within a short time to be fixed by the court, be required to show cause, if any it has, why it shall not be ordered by the aforesaid court to make full payment to the Indianapolis Union Railway Company of the full amount that would have been payable to the Indianapolis Union Railway Company by the Cincinnati, Indianapolis & Western Railway Company if it had continued in the use and enjoyment of the railroad property, rights and privileges described in and ordered to be sold by the decree of foreclosure and sale made and entered by the aforesaid court in the above entitled (fols. 103 and 104) causes, and that your petitioners shall have such other and further relief as the equity of the case may require" (R. 65).

The railroad company moved to dismiss the petition, one of the grounds being:

> "First. This court is without jurisdiction in this cause to make the order or grant the relief for which the petitioners pray, or any part thereof" (R. 66).

In ruling against the railroad company on this motion, the court said:

> "These petitions are in no sense actions for money. Their purpose is to prevent the operation of decrees of this court with respect to a subject in which the petitioners have, and had before the decrees were passed, a vital interest, and which was never adjudicated as to them" (R. 70 bot.), and
>
> "The subject of remedy presents some difficulties, but I think the petitions may be regarded as auxiliary to and ancillary to the foreclosure suits in which they were filed, and dependent on those suits for jurisdiction" (R. 71).

The ultimate decision was that the railroad company was liable for two-thirteenths of the fixed rental (R. 9-10), the decree entered upon the petition reciting:

> "The court further finds that the rights of the Cincinnati, Indianapolis & Western Railway Company in said contract were sold under the decree in this cause, in Equity, No. 50; . . . The attempted rejection filed, to accept in part and reject in part the said obligation, was not permissible under said decree and was ineffectual; . . . and it is ordered that the said decree and proceedings thereunder be and are so construed" (R. 103).

This decree was affirmed on appeal by the Circuit Court of Appeals for the Sixth Circuit (279 Fed. 356; R. 109-18), after first carefully considering the question of jurisdiction

and upholding the jurisdiction of the court (R. 112 bot.-115).

In the course of its discussion of the question of jurisdiction the Court of Appeals said:

> ". . . it was highly fitting, and in the interest of orderly administration, that the court which pronounced the decree should construe it. Notwithstanding the property had passed from the possession of the court, appellant, as the purchaser, would have had an undoubted right to apply to the court for relief respecting the controversy over (fol. 171) its right of election under the sale. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 109, 112" (R. 113 bot.-114 top).

Petition for writ of certiorari to review this judgment of affirmance was denied May 1, 1922, by this court (R. 10), (258 U. S. 629).

The foreclosure decree entered June 29, 1915, contains, as before stated, the following provision:

> "All questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this court for further relief at the foot of this decree" (R. 2, 26).

On July 2, 1924, this appellant moved the court, in the foreclosure case, for leave to file its petition and that notice thereof, with a copy of the petition, be served on the parties in the foreclosure suit named as defendants to the petition (R. 1). This motion was granted (R. 1-2) and a copy of the order granting it and of the petition was duly served (R. 2).

Thereupon appellant filed, on July 2, 1924, its petition in the original foreclosure case (R. 2), alleging, in substance, that until the decision of this court denying the petition for writ of certiorari, petitioner was mistaken as to its rights and obligations arising out of the foreclosure

decree and its election thereunder; that if it had been aware that its election would obligate it to pay two parts of a fixed rental instead of one, it would have rejected all obligations under both contracts, since the payment of two-thirteenths of the said fixed rental was then and is now out of all proportion to the use petitioner ever had made or can make of said terminal facilities and would result in its insolvency. The petition further detailed the hardship suffered by petitioner and prayed for a rescission of petitioner's "acceptance" and for a modification of said foreclosure decree to the extent necessary to effect the same, and for further equitable relief (R. 11).

The defendants thereupon filed a motion to dismiss the petition (R. 13) on the ground that the court was without jurisdiction, and alternatively that the facts did not constitute a valid cause of action in equity, that petitioner's right to a modification of the foreclosure decree was exhausted by the prior proceedings, that the mistakes were mistakes of law only and not of fact, and that the petitioner had been guilty of laches.

The trial court heard the case on the pleadings and rendered its written opinion on the motion to dismiss (R. 33-45 inclusive) holding:

1. The court had jurisdiction to entertain the petition on the ground that the same was ancillary to the original foreclosure suit (R. 36, 37).

2. The mistake was of the character against which equity will grant relief (R. 37, 39).

3. Petitioner was not barred by laches, there are no elements of estoppel involved, no change in position of the adverse parties or features making relief inequitable (R. 39, 40).

4. Petitioner's delay in moving for approximately two years after obtaining knowledge of its rights constituted

a waiver and acquiescence on its part which prevented the granting of the relief prayed for (R. 40, 41).

It should be noted that the trial court, in its opinion, decided all of the matters raised by defendants' motion to dismiss, *including the question of jurisdiction,* in favor of petitioner, but held that the petition should be dismissed on the ground of waiver and acquiescence.

Thereupon, by leave of court first had, petitioner filed an amendment to its petition (R. 43-44) specifically negativing the idea of waiver and acquiescence referred to in the opinion of the trial court, by alleging that petitioner never intended to acquiesce and did not acquiesce in the decision requiring it to pay two parts of the fixed rental instead of one; that during the interim between the denial by this court of its petition for writ of certiorari on May 1, 1922, and the filing of its petition in the court below, on July 2, 1924, it negotiated with defendants to endeavor to rescind and to be relieved of said contract, without recourse to court action; that when petitioner discovered it could obtain no relief without resort to litigation, it expressly made all payments under protest and began preparation for court action in order to obtain relief; that all of the defendants had knowledge that petitioner did not intend to acquiesce; that none of the defendants nor any other company has been in any way prejudiced by the interval of time, but that, on the contrary, benefited by petitioner's double payments during said period.

Defendants then filed another motion to dismiss the petition, as amended (R. 44). The court thereupon rendered a second opinion, supplementing the original opinion (R. 45, 49), holding that it would have had jurisdiction to entertain the petition on the ground that the same was ancillary to the original foreclosure suit and would have granted the relief prayed for, had petitioner asserted its rights within a reasonable time after May 1, 1922, when

certiorari was denied, but holding that petitioner's delay constituted a "new mistake" (R. 48) made in 1922 and that, therefore, the petition, as amended, was not ancillary to the original foreclosure suit because it presented no cause of action for relief from the original mistake in 1915, but only for relief from the alleged "new mistake." The court, therefore, modified its previous opinion and ordered the petition, as amended, dismissed for want of jurisdiction (R. 49) and a decree was entered accordingly (R. 49).

The assignment of error intended to be urged is (R. 50 bot.-51):

> "In connection with its petition for an appeal from the decree entered on the 7th day of February, 1925, the Cincinnati, Indianapolis & Western Railroad Company files the following assignment of error, assigning as error that the District Court erred in dismissing the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, for want of jurisdiction."

## ARGUMENT.

### 1. The District Court had Jurisdiction to Entertain Appellant's Petition because it is Ancillary to the Foreclosure Action.

Appellant's petition sets forth the original foreclosure proceedings (R. 7), including the reservations in the decree (R. 2), details the intervention proceedings of the Indianapolis Union Railway Company in the foreclosure cause and the litigation connected therewith (R. 9, 10) and prays for relief with reference to the subject-matter of property involved in the original foreclosure suit and with reference to the decree therein. The foreclosure decree itself shows that the contracts which were the subject of election or rejection were considered part of the property foreclosed

(R. 7, 30). The right of election was created by the foreclosure decree. Relief from an election erroneously made is the object of the petition.

With respect to these very parties, in this same foreclosure case, the petitioner had been the defendant to a petition brought by the Indianapolis Union Railway Company and the proprietary companies, looking to the interpretation of that part of the decree of foreclosure allowing the railroad company, as assignee of the purchaser, to make an election with respect to the contracts for the use of the tracks of the Union Railway Company. The petitioners had not theretofore been parties to the foreclosure suit. Nevertheless, when the present petitioner made the contention that such petition was not ancillary to the foreclosure case, its contention was overruled and such petition was held to be ancillary.

Moreover, the foreclosure decree was so interpreted that notwithstanding it provided, in terms (R. 23), the assignee of the purchaser

> ". . . shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the clerk of this court, within said period of thirty days"

and the assignee did file such election not to adopt one of the contracts within the period, this was, under the decree, an election to adopt, *nolens volens*, and it was further held that the Union Railway and proprietary companies, on their petition for construction of the decree, were entitled to recover a money judgment against the defendant to their petition.

In the course of its opinion, reaching this result, the Court of Appeals said of the defendant to the petition:

> ". . . appellant, as the purchaser, would have had an undoubted right to apply to the court for relief

respecting the controversy over its right of election under the sale. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 109, 112" (R. 114 top).

Now, the assignee of the purchaser does apply to the court for relief respecting a controversy over its right of election under the sale. Relief from an interpretation placed on the election provision of the decree in the same case, is no less ancillary to the foreclosure case than was a controversy between the same parties reversed, seeking the interpretation of the election provision of the decree.

The effect of a similar specific reservation of jurisdiction in a decree was considered by this court in the recent case of *Central Union Trust Company of New York* v. *Anderson County, Texas, et al.*, 45 Supreme Court 427, decided April 13, 1925, where it was held:

> "The provision of the decree of May 17, 1915, retaining jurisdiction, extended to all questions not determined and reserved the right to resell the property in case the purchaser should fail to make any payment on account of purchase price within a specified time after the order requiring it. The decree of August 10, 1922, confirming the sale, retained jurisdiction over the property with reference to all claims against the railway company and to enforce payment of any judgment therefor out of the property sold. It reserved all questions relating 'to suits now pending in this court in this cause, or affecting the property above dealt with . . . for further hearing and determination. . . .' In view of the reservations in these decrees, the sale and delivery of the railroad properties to the purchaser did not deprive the court of jurisdiction over the property or terminate plaintiff's right to carry on this suit. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54, 28 S. Ct. 182, 52 L. Ed. 379; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 111, 24 S. Ct. 399, 48 L. Ed. 629; *Smith* v. *Missouri Pacific R. Co.* (C. C. A.) 266 F. 653."

In *Cincinnati, Indianapolis & Western Railroad Co.* v. *Indianapolis Union Railway Co. et al.* (C. C. A. 6), 279 Fed. 356, 362, the court said:

> "As respects jurisdiction to entertain the petition in question: It is the broad general rule that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce or correct it, such bill may be filed in and entertained by such court, notwithstanding the parties interested in having such construction made would not, for want of diverse citizenship, be entitled to proceed by original bill of any kind in a federal court."

In *Lang et al.* v. *Choctaw, Oklahoma & Gulf Railroad Co. et al.* (C. C. A. 8), 87 C. C. A. 307, 160 Fed. 355, 360, the court held:

> "A bill in equity dependent upon a former suit in the same court may be maintained by the purchaser under the decree or by any other party interested therein . . . to restrain, avoid, explain, or enforce the judgment or decree therein."

See also *Hoffman* v. *McClelland*, 264 U. S. 552; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54; *Julian* v. *Central Trust Co.*, 193 U. S. 111; *Fulton National Bank of Atlanta* v. *Hoosier et al.*, 267 U. S. 276, 280, decided March 2, 1925.

That a bill to reform or rescind or otherwise grant equitable relief is ancillary, see *Rosenbaum* v. *Council Bluffs Insurance Co.*, 37 Fed. 724; *Bradshaw* v. *Miners Bank of Joplin* (C. C. A. 7), 26 C. C. A. 673, 81 Fed. 902. Diversity of citizenship is not necessary in an ancillary bill. *Krippendorf* v. *Hyde*, 110 U. S. 276.

The trial court, in its first opinion, finding it had jurisdiction, said, with reference to the question of jurisdiction:

> "If . . . the question presented involves the construction to be placed upon the attempt of the petitioner to accept one contract and to reject the other, under the foreclosure decree, or if the petition seeks to relieve the petitioner from the full force and effect of the decisions in the prior litigation and to procure such modification of the foreclosure decree as will now enable the petitioner to make that election which it is stated it would have made but for its mistake as to the nature of the election afforded by the foreclosure decree and but for the mistake as to its then existing rights thereunder, we are clearly of the opinion that the present petition is ancillary and supplemental to the original actions, and that the court now has jurisdiction to consider the same" (R. 36).

The court, after quoting from the decision, above referred to, of the United States Court of Appeals for the Sixth Circuit in the case between the same parties, continued:

> "And just as a court is unquestionably authorized to entertain a supplemental bill to construe, enforce, and give effect to its decrees and to protect the acknowledged prior jurisdiction of the court, so also it would seem proper to entertain a bill to avoid an inequitable effect of the acts of the purchaser and to relieve such purchaser from the unintended effect of his act under the decree, where such act was the result of honest mistake upon the purchaser's part. This is especially so where, by the decree, the court reserves for future adjudication all questions not then disposed of and gives to any party to the cause the right to apply to the court for further relief at the foot of the decree" (R. 36).

When the petitioner, by leave of court, amended the petition so as to show clearly it had not acquiesced in the two

years intervening between decision by the highest court and bringing of the present suit, the trial court changed its opinion on the question of jurisdiction, which it had sustained in its first opinion, and said (R. 48):

> "Our view of the relationship of the parties likewise has distinct bearing, we have said, upon the other aspect of the question, that (fol. 74) of ancillary jurisdiction. The only mistake of law which in our opinion could have made the present proceedings ancillary to the former ones was the mistaken belief of the petitioner that the contract of one of its predecessors in title might be rejected and the contract of the other predecessor in title accepted. This mistake became inoperative and ineffective in 1922 when the petitioner was fully advised of it, and we are of the opinion that the new mistake under which the petitioner then labored was so independent of or so remote from the operation of the decree in foreclosure that the one can not be said to raise a question in any way ancillary to the other. If cognizable by a court of equity at all it is cognizable only by such court having jurisdiction over the parties and under its general equity powers. It involves no question of construction, interpretation, modification or enforcement of the foreclosure decree. It is a controversy existing between the parties founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure. It is not to be considered as ancillary to the foreclosure suit.
>
> "Therefore, passing the question as to whether this ignorance of its rights under the general law is such a mistake as will warrant relief in equity, and passing the fact that the petitioner is apparently not relying upon this subsequent mistake or ignorance of the law in 1922, it is clear, to the court at least, that this court has not jurisdiction of the present controversy as ancillary to the original actions and proceedings herein . . . In so far as the previous opinion may have seemed to indicate that such rescission would not be

granted, such previous opinion should therefore be modified. We are not at all prepared to so hold. If such independent action were brought, waiver, acquiescence or laches, not having prejudiced the defendant, would presumably not bar consideration of the equities. But this is a very different question from the one here considered, namely, whether a failure to act promptly when the duty for such action was clearly imposed upon petitioner gives rise to a cause of action which is ancillary to our former proceedings herein. In so far as the previous opinion or orders dismiss the petition for want of equity the same should be modified, and the amended petition must be dismissed for want of jurisdiction" (R. 48 and 49).

In this, we think, the court erred. If, as the court in its first opinion held, a petition seeking relief from an election made by mistake is ancillary to the suit the decree in which created the right of election, then, surely, mere delay, explained or unexplained, does not deprive the petition of its ancillary character. Delay, accompanied by elements of estoppel, may sometimes be a ground for refusing relief on the merits. It does not, however, oust the jurisdiction of the court, any more than was the case in *Oliver American Trading Co.* v. *Mexico,* 264 U. S. 440, where the trial court mistakenly thought the immunity of a sovereign state from suit prevented the court from taking jurisdiction as a Federal court, or than was the case in *Smith* v. *Apple,* 264 U. S. 274, where the trial court incorrectly thought that the Federal statute, forbidding enjoining prosecution of suits in state courts, prevented the Federal court as a Federal court from entertaining jurisdiction.

**2. Since the Decree Dismissed the Petition on the Sole Ground of Want of Jurisdiction and a Sufficient Certificate was Filed, the Case was Properly Appealed to this Court.**

This case falls squarely within the rule laid down by this court in *Smith* v. *Apple*, 264 U. S. 274, 277, where, speaking by Mr. Justice Sanford, the court said:

> "True it is that where a district court dismisses a suit upon the specific ground of want of jurisdiction, this Court, upon a sufficient certificate, acquires jurisdiction of a direct appeal, and, whatever the ground assigned by the district court for the supposed want of jurisdiction, must determine whether or not that court had and should have exercised the jurisdiction thus denied."

In this case, the District Court, by its decree, entered February 7, 1925, dismissed the decree

> "for the sole reason and ground hereinabove specified," viz., "and the Court being fully advised in the premises finds that the petition of the Cincinnati, Indianapolis & Western Railroad Company, as amended, is not ancillary, but is original, and that as an original bill this court is without jurisdiction to entertain the same because no Federal question is presented therein and because the requisite diversity of citizenship does not exist" (R. 49).

The Court further made the certificate, printed at pages 52-53 of the record, whereby it certified that the decree was entered pursuant to the opinion above referred to, sustaining the joint and several motions of the defendants to dismiss the petition and dismissing the same,

> "on the sole ground that it appears on the face thereof that said petition, as amended, does not show the exist-

ence of the requisite diversity of citizenship, nor the existence of a Federal question; and that this court not having found the said petition to be ancillary to any prior suit and having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction . . ."

That decree and certificate take the case out of the facts upon which the decision in *Smith* v. *Apple*, (*supra*), were based, and bring it within *Sovereign Camp Woodmen* v. *O'Neill*, 266 U. S. 292, 295.

### 3. Appellant's Petition, as Amended, is Ancillary to the Foreclosure Suit and the District Court Had Jurisdiction, Therefore, to Entertain It.

The trial court, in its first opinion, held that it had jurisdiction to entertain the petition, but that waiver and acquiescence prevented granting the relief sought and so ordered the petition dismissed for want of equity. The amendment to the petition not only denies specifically any waiver or acquiescence, but sets forth facts which explain the delay from May 1, 1922, to the filing of the petition, July 2, 1924, and which show an intent during that period to rescind, notice of which intention was given to appellees (R. 43-44).

The trial court, in its second opinion (R. 45-49), apparently held that despite these allegations in the amendment to the petition, appellant was under a duty, more promptly than it did, to assert its position and adhere to the same as a condition precedent to any right to relief from the mistaken election made in 1915, and its failure to do so constituted a "new mistake" over which the court had no jurisdiction to grant relief, on the ground that the same was not ancillary. As to this, we contentd that:

(a) The allegations of the original petition show there was neither waiver nor acquiescence since there was no

estoppel or prejudice suffered by appellees, nor any other feature involved making it inequitable to grant relief.

(b) The allegations of the amendment to the petition specifically deny waiver or acquiescence on the part of appellant, and on a motion to dismiss, must be taken as true.

(c) There was no "instant duty" on appellant, as a "condition precedent" to obtaining relief, to bring suit immediately after learning of its legal rights, in May, 1922.

*As to (a):* Before a court of equity will bar relief on the ground of waiver or acquiescence, there must be present some element making relief inequitable, as something of the nature of an estoppel, some change of position or hardship on the adverse party caused by the delay which constitutes such waiver or acquiescence, or the parties seeking relief must be confronted with the task of choosing two inconsistent remedies. The trial court specifically found that there was no element of laches involved (R. 39), no prejudice suffered by appellees (R. 40), and that there were elements of hardship on appellant "in enforcing an unacceptable obligation and such injustice in penalizing the innocent mistake of a party litigant" (R. 39),—in short, no elements making it inequitable to grant the relief sought. The court simply held that there was imposed upon appellant the duty to assert its position promptly and adhere thereto, and that the mere delay of two years before suit was instituted, notwithstanding the absence of any inequitable features, nevertheless constituted waiver and acquiescence sufficient to bar relief. This is a misapplication of the equitable doctrine of waiver or acquiescence. In 1 *Corpus Juris* 906, it is stated that "acquiescence is a branch of the law of estoppel and is used to defeat a party's action on the principle of equitable estoppel."

That acquiescence is no more than an instance of the law of estoppel by words or conduct, see, *Northern Assurance Co.* v. *Grandview Bldg. Ass'n*, 183 U. S. 308, 357; *Hampton*

*Stave Co.* v. *Gardner,* 83 C. C. A. 521, 154 Fed. 805, 808; *Hall* v. *Otterson,* 52 N. J. Eq. 522; *Norfolk, etc., Railroad* v. *Perdue,* 40 W. Va. 442; 13 *Halsbury's Laws of England,* p. 397, paragraph 561. Thus, in *Lewin* v. *Telluride Iron Works,* 272 Fed. 590, 598, the court says, "but an estoppel is an essential element of waiver. Where there is no estoppel, there is no waiver." The necessity of some element of estoppel is clearly brought out by the case of *Ormsby* v. *Longworth,* 11 O. S. 653, which was a suit to reform a deed on the ground of mistake. The deed was given and the mistake made in 1819, but the mistake was not discovered until 1834 and suit not brought until twenty years later. This delay was strongly urged as a ground for denying relief, but the relief was nevertheless granted. The court emphasized that there were present no inequitable features and no adequate remedy at law.

An excellent discussion of the doctrines of waiver and acquiescence is given in *Williston on Contracts,* Vol. II, page 1312, note 20, where the learned author says:

> "What is here called waiver may sometimes be implied from silence with knowledge of the facts. This is 'acquiescence' in one of the meanings given to that word. In *DeBussche* v. *Alt,* 8 Ch. Div. 286, 314, Thesiger, J., 'The term "acquiescence" which has been applied to his conduct, is one which was said by Lord Cottenham in *Duke of Leeds* v. *Earl Amherst* (2 Ph. 117, 123), ought not to be used; . . . Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, can not take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise

would be without consideration, and therefore not binding.' Perhaps it should rather be said that acquiescence always means such non-action as to indicate assent that a known situation shall continue. The distinction seems rather to be in the effect of acquiescence than in the meaning of the word. Just as a promise may sometimes create legal consequences and sometimes may not, so acquiescence may form the basis of a true waiver, or it may not, according as change of position is made in reliance upon it."

In none of the cases cited by the court in its opinion (R. 40) was a litigant denied relief solely on the ground of waiver or acquiescence. In all of them there was either an element of estoppel, change of position, laches or facts negativing the existence of any mistake. Several of the cases cited can be readily distinguished on the additional ground that the party seeking relief had two remedies available, one at law and the other in equity, and that an unreasonable delay might deprive such party of relief in equity, although he was still entitled to relief at law. The remedies at law and in equity being inconsistent, long acquiescence is frequently held to constitute an election to take the legal remedy and a waiver of the equitable remedy. See *Stuart* v. *Hayden*, 18 C. C. A. 618, 72 Fed. 402, 411; *Miller* v. *Continental Ship Building Co.*, 265 Fed. 158. For example, in *Grymes* v. *Sanders*, 93 U. S. 55, referred to by the trial court as the leading case in support of its position, relief was denied by the court, first, on the ground that the original mistake of the plaintiff, if any, was due to the plaintiff's negligence; second, the mistake was either not made out or was wholly immaterial and was so considered by the plaintiff, and acquiescence entered into the case only to show that the mistake was considered immaterial by the plaintiff; third, the element of estoppel or change of position was present, the court stating that "a court of equity

is always reluctant to rescind, unless the parties can be put back in statu quo."

*As to (b):* Despite the fact appellant considered that its petition, as originally filed, showed no waiver or acquiescence, nevertheless, in view of the first opinion of the trial court, an amendment was filed denying any waiver or acquiescence and denying any intent to acquiesce. The amendment, moreover, alleges that appellant gave notice to appellees of its intention to rescind. All of these allegations, on a motion to dismiss, must be taken to be true. The intent to waive or acquiesce is an essential element of the doctrine of waiver and acquiescence and in the absence thereof these doctrines are not applied as a bar to relief. See *Dorrance* v. *Barber,* 262 Fed. 489, 492; *Pierson & Co.* v. *Iwai & Co.,* 285 Fed. 769; see also 1 *Corpus Juris* 905-907.

*As to (c):* Even in the second opinion, the trial court says that "if promptly asserted, . . . such relief should have been granted. A petition to achieve that result would have been truly ancillary to the foreclosure proceedings" (R. 47). The trial court, however, held that appellant was under an instant duty of announcing its purpose to reject both contracts immediately upon learning of its rights in May, 1922 (R. 46); that the fact of appellant's intention not to waive or acquiesce and the absence of inequitable features were wholly immaterial (R. 46, 47). The court then concludes that:

> "The only right given by the decree was to reject within the short period allowed. The petitioner was advised in 1922 that it must reject both contracts or neither. It saw fit not to reject both. It therefore became bound by both, and the only mistake which it could possibly now urge was that in May, 1922, counsel did not inform it that both contracts could still be rejected, that they were mistaken as to their legal rights in this particular and at that time" (R. 47).

Here the *ratio* of the decision seems to shift from the waiver and acquiescence feature to the theory of condition precedent. The court, in its second opinion, says:

> "The right is not now unenforceable by reason of any waiver or acquiescence in the sense of estoppel, but the right to reject has ceased to exist by reason of breach of the condition precedent that it be promptly asserted. The right given was not of election in the sense of the necessity of definite action either to accept or reject, but was really an option to reject, which option has expired."

In other words, the reason that the court has lost jurisdiction now and the reason that appellant is denied relief is held to rest upon the fact that petitioner did not exercise its right to rescind forthwith after May, 1922. This basis of the decision, ordering the amended petition dismissed, can in no way be supported by the authorities on waiver and acquiescence cited by the trial court in the first opinion. The court apparently was influenced by the form of the foreclosure decree which limited the right to elect or reject within thirty days (R. 3). But this provision obviously has nothing to do with the time within which appellant must sue to rescind an election made by mistake under said decree. Once the election was made, the provision as to thirty days is no longer applicable and its force was spent.

True, it might be urged that appellant would be required to file suit to rescind within a reasonable time after knowledge of its rights. As a matter of fact, the delay of two years is explained by the allegations in the amendment to the petition and such delay can not be considered an unreasonable one.

The foregoing argument with reference to waiver and acquiescence may seem to involve a discussion of the merits; yet, in view of the peculiar theory of the trial court, is

intimately related to the question of jurisdiction. Since the Court held that because of waiver, acquiescence or condition precedent, appellant's petition did not present a cause of action for relief as to a mistaken election made in 1915, but only for relief from a "new mistake" made in 1922, if the court erred in its holding on waiver, acquiescence and condition precedent, then the mistake in 1915 presented by the original petition constitutes the only mistake involved in the case, *as to which the court conceded it had jurisdiction.*

Indeed, even if the theory of the court that there was a new mistake made in 1922 were correct, the petition, as amended, is still ancillary. No "renewed contract relation" (R. 47) came into existence through appellant's inaction in 1922. Even on the theory of a new mistake, the petition seeks relief from the obligation created by the foreclosure decree and the election thereunder, is sought by a party to that foreclosure decree, concerns property involved in that decree,—in fact, deals with a contract sold pursuant thereto. If appellant's original petition could be entertained by the District Court, the same considerations apply to give jurisdiction over the amended petition. Save for the factor of an explained delay for two years, appellant's petition, as amended, sustains the same relation to the foreclosure decree as appellant's original petition.

We do not elaborate, because unrelated to the question of jurisdiction, other features of this case, such as the fact that the law favors compromise of disputes and should not penalize appellant for attempting to adjust this controversy amicably, after it knew its rights, before proceeding with court action; or, that the obligation requiring the payment of two parts of the fixed rental imposes such a hardship upon appellant that if no relief is granted, appellant will become insolvent and unable to function as a common carrier (R. 11). Moreover, in determining whether delay,

with a definite statement of non-acquiescence and non-intention to abide by the situation, or the failure to bring a suit to rescind within two years (when appellees were put on notice that such suit would be brought if other efforts failed), amounted to an election, as a matter of law, to accept the contract requiring two-thirteenths payment, this Court should have in mind the extreme hardship of such a conclusion. If it were necessary to cease to use the Union terminal facilities in order to prevent an election to be bound by the contract, then appellant is in the situation of going to an enormous expense in providing terminal facilities of its own at its two points of entrance into Indianapolis with the danger that if suit were instituted a court might, for some reason, deny it relief, although it would still have the liabilities of the old contract, with interest and penalties, in addition to the expense of the new terminal arrangement. Surely, there is a public policy which would operate to prevent the requirement of such an expenditure!

We urge that the District Court had jurisdiction of appellant's petition, as amended, and should have heard and determined the merits and that the decree of said court dismissing the petition, as amended, for want of jurisdiction, on the ground that the same was not ancillary to the original foreclosure suit, should be reversed.

Respectfully submitted,

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